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NOTE AND COMMENT.

MUTUALITY IN AUTOMOBILE AGENCY CONTRACTS.—Within the past few years several courts have had to pass upon and construe argreements between the manufacturers and the selling-agents of automoobiles, which have necessitated a thorough discussion of the principles of mutuality of obligation of contracts. The attempt to reach a correct solution has developed a vigorous difference of opinion on the subject in some recent cases which it may be of interest to discuss and compare.

One recent case is that of *Gile* v. *Inter-State Motor Car Co.*, (N. D. 1914) 145 N. W. 732, in which the plaintiff was suing to recover a deposit made by him under a written agreement, signed by both parties, by which he was to act as "dealer" for the defendant, the Inter-State Motor Car Co., in a named district. He agreed to advertise and use his best efforts to sell cars made by the defendant, and was to receive as remuneration 20% of the list price of each car sold. He ordered and agreed to buy not less than 50 cars, deliverable as specified in the memorandum, and deposited with the defendant $25 as part payment on each car, making a deposit of $1250 in all. It was also provided that this sum (which the plaintiff, having made no sales or

orders, now seeks to recover) should be regarded as liquidated damages in case of plaintiff's default.

The contract also provided inter alia that "The distributors (defendant company) reserve the right to change all prices and discounts mentioned in this contract on two weeks notice," * * * "That no order * * * shall be binding on said distributors * * * unless it is accepted by the distributors at least 30 days prior to date of delivery," and "That this contract shall expire by its own limitation on September 1st, 1911, or may be cancelled by either party upon thirty days' written notice given to the other by registered letter, and such cancellation of this contract shall operate as a cancellation of all orders * * * which may have been received from said dealer and which have not been shipped prior to the date when such cancellation takes effect but shall not cancel any standing accounts for automobile parts, etc."

From these provisions it may be readily seen that the defendant was not bound to do anything by its apparent promise to sell cars to the plaintiff. It could at any time change the prices and discounts; it could give notice of cancellation of the contract and could refuse to fill and ship any orders for cars until after the date when cancellation was to take effect, which would, by the terms above set forth, operate to cancel the orders not shipped. In substance the contract was very similar to those in the cases of *Velie Motor Car Co.* v. *Kopmeier,* 194 Fed. 324, and *Oakland Motor Car Co.* v. *Indiana Automobile Co.,* 201 Fed 499, later referred to.

The prevailing opinion in the principal case upheld, in effect, the defendant's contention that plaintiff had broken a contract for the sale of chattels and was not entitled to recover the part of the price he had paid. The court held that, whether this agreement was mutual or not at its inception, it had *at its expiration* become a valid contract because the parties had, during its life, regarded it as good and had held themselves ready to perform according to its provisions; and when it expired it had been so executed on the part of the party originally not bound—the defendant —that there was a consideration for the promise of the plaintiff to buy cars, and therefore, there being a valid contract of sale, the plaintiff could not recover what he had paid.

Justice Goss strongly dissented, pointing out that the defendant was not bound at the inception of the contract by any enforceable legal obligation, and that nothing had since occurred or been done which by any stretch of imagination could be called a performance by the defendant, such as would remedy the lack of an enforceable obligation.

On principle it is believed that the dissenting opinion presents the better view and states the law correctly, and that the prevailing opinion cannot be supported on the grounds stated therein; authority, presently to be noted, supports this conclusion. At the outset, it will doubtless be admitted—as it is impliedly, at least, conceded in the opinion of the court in the principal case—that where a contract is executory and consists of mutual promises, each of which is the consideration for the other, these promises must, to render the contract valid, result in an immediately binding obligation on

both parties, which cannot be terminated by either party without the consent of the other. 1 PARSONS, CONTRACTS, (9th Ed.) 486. When, therefore, parties seek to enter into such an executory agreement as that in the principal case, but stipulate that the agreement is to be nugatory at the will of one party, no binding obligation results. Neither party can hold the other, and the agreement is not a contract; neither promise complies with the requirements of a valid consideration. *American Agricultural Chemical Co.* v. *Kennedy & Crawford,* 103 Va. 171, 48 S. E. 868; *Cummer* v. *Butts,* 40 Mich. 322, 29 Am. Rep. 530; see also Professor WILLISTON'S article, CONSIDERATION IN BILATERAL CONTRACTS, 27 HARVARD LAW REVIEW 502, 528, citing the *Velie* case and the *Oakland* case and saying "a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter promise" and "an agreement which one party reserves the right to cancel at his pleasure, cannot create a contract."

The contention that the contract in the principal case was void is fairly well supported by recent authority. Cases strikingly similar to that in hand have been brought before the Federal and New York courts and their conclusions support the view of Justice Goss' dissent. In *Velie Motor Car Co.* v. *Kopmeier,* 194 Fed. 324, a combined sale and agency agreement was made, very like that in the principal case. Exclusive agency in a given territory was granted to the agent or dealer, who was defendant in the case. He agreed to buy not less than 50 cars before the contract expired by limitation on October 31, 1910, and deposited a certain amount on each machine. The plaintiff, the manufacturer, agreed to sell but also reserved the right to cancel the contract at any time on 10 days notice. Before the contract had expired and before any cars had been sold or ordered the dealer repudiated the contract. The plaintiff brought suit and declared on the express contract, for its breach by defendant. Defendant claimed there was no mutuality and made a counter-claim for the deposit. Plaintiff replied and defendant demurred. In construing this agreement the court held that a provision for the cancellation of an agreement by one of the parties made its performance wholly optional and rendered it nudum pactum, and that no action arose from a failure to carry it out. It was not a contract during the time it operated. The defendant was allowed to recover the amount of his counter-claim for the deposit.

The contract sued on in *Oakland Motor Car Co.* v. *Indiana Automobile Co.,* 201 Fed. 499, was in many of its provisions identical with that in the principal case. It provided that no orders for cars by the dealer were "binding unless accepted by the manufacturer at least 30 days prior to the date of delivery," that the dealer should have exclusive agency; that the dealer should order at least 50 cars before September 1, 1914, and deposit with the manufacturer $50 on the price of 25 of the cars, and that the contract may be "cancelled for just cause on 30 days written notice." The manufacturer canceled the contract on October 31st. and returned the deposit. The dealer brought an action for breach, and it was held, in accordance with the decision in the *Velie* case that "the defendant (manufacturer) was at liberty either to accept or refuse compliance with any tender of

purchase thereunder, leaving no basis for implying a promise on the part of the defendant to sell the 50 cars and no liability for refusal to make further sales to the plaintiff." The decision was further fortified by the fact that the contract was held bad for uncertainty.

The decision in the case of *Goodyear* v. *Koehler Sporting Goods Co.*, 143 N. Y. S. 1046 (the comment upon which in 12 MICH. L. REV. 321 is quoted from by Justice Goss in his dissenting opinion) is merely a reiteration of the above two decisions and reaches the same results. The facts differed in that six of the twenty cars the agent agreed to buy were sold and delivered, and in the contract the manufacturer boldly stipulated for exemption from all liability whatsoever under the contract. The agent as in the principal case, brought his action after the expiration of the contract for the balance of his deposit, and was allowed to recover. As to the efficacy, as consideration, of the appointment of plaintiff as "agent," see the *Velie* and *Goodyear* cases (cited above) and *Cool* v. *Cuningham*, 25 So. Car. 136.

Assuming, then, that the contract in the principal case was void for want of mutuality, can we accept the court's decision that "to the extent that the parties acted under and performed the same, it is valid and enforceable"? This compels an inquiry into the legal effect of an agreement which, for want of mutuality, fails of being a contract. Two positions have been taken on this point. First, that it has the effiect of a continuing offer by the party, if any, whose engagement is binding in terms, which may, prior to revocation, be accepted by the other party, a contract resulting. Second, that no offer is involved, but that the agreement amounts, at most, to a preliminary negotiation looking to the formation of a future contract or contracts by offer and acceptance. PAGE, CONTRACTS, § 307. The latter position would seem the more sound. Here for example, the plaintiff offers to buy cars and act as agent; the defendant also proposes terms. The whole agreement is reduced to writing and the parties make promises to each other which are not legally binding because of lack of consideration. No offer by the plaintiff now exists, because all proposals by both parties have been merged in the agreement as completely as if it had produced a valid contract. *Vogel* v. *Pekoc*, 157 Ill. 339; *Hunt* v. *Livermore*, 5 Pick. 395, 397; *Davie* v. *Lumbermen's Mining Co.*, 93 Mich. 401; *Strong* v. *Sheffield*, 144 N. Y. 392; *Gulf, Colorado & Santa Fe R. R.* v. *Winton*, 7 Tex. Civ. App. 57. If the plaintiff thereafter ordered under the agreement, this would constitute an offer to buy, which upon acceptance by delivery of the cars, would make a unilateral contract of sale of the cars delivered. Or the defendant might have tendered cars to plaintiff, which would amount to an offer to sell, and, upon acceptance of the cars, would give rise to a like contract of sale. In both instances the offer would, as respects its terms, be construed in the light of the prior written agreement, and to this extent the prior agreement would be validated by the subsequent dealings.

But even if we grant the contention of the defense that the agreement in the principal case amounted, in legal effect, to a continuing offer such as might, if accepted by performance, be converted into a unilateral contract,

it is believed that there was no such performance on the part of the defendant as would amount to an acceptance. If the agreement involves any continuing offer, it must be an offer embracing all the terms of the agreement, and the performance necessary to complete the contract must be a full and complete execution of the acts contemplated by the offer, and an attainment of the object of the agreement, in accordance with the terms of the offer; and that this is the impression in the minds of the courts is indicated by their language (though not expressly decided) in the following cases. *Jones* v. *Robinson,* 17 L. J. Ex. 36; *Kennaway et al.* v. *Treleavan,* 5 Mees. & W. 498; *Mills* v. *Blackall,* 11 Q. B. 558; *First National Bank* v. *Watkins,* 154 Mass. 385, and *Morton* v. *Burn,* 7 Ad. & El. 19.

It seems clear, then, that in the principal case, even granting the theory of continuing offer, there was no such acceptance as would make a valid unilateral contract.

On what other theory, then, can an agreement lacking in mutuality become a binding contract? Surely the position of the dissenting justice is unquestionable, that *mere lapse of time with no performance* could not of itself remedy a lack of mutuality and so make a valid contract. Yet mere lapse of time seems to be all that the majority of the court can rest on. FISK, J. says: "The parties saw fit during the entire life of the contract to treat it as a valid and subsisting contract. * * * To the extent, therefore, that the parties acted under and performed the same, it is valid and enforceable." But to what extent did the defendant "act under and perform" the contract? Apparently only to the extent that "during the entire time in which such contract was in force" (i. e. until the time fixed by the agreement for its expiration) "defendant held itself ready, able and willing to furnish such cars as plaintiff might order." But the wording of the contract required something further to be done by the defendant. It was expressly stipulated that no order from the plaintiff should be binding upon the defendant unless accepted by it at least thirty days before the time set for delivery of the articles ordered. The agreement itself contained an order for fifty cars, to be delivered at specified dates, but it nowhere appears that this order was ever accepted in writing by the defendant; until such acceptance, of course, there could be no performance of the agreement. It would seem that the court's claim that the contract was fully performed is wholly without foundation.

In conclusion, it seems clear that principle and authority unite to preclude the court from holding that there was any valid contract here, either on the theory that this was in effect a continuing offer, or on the theory that there was any performance or acceptance of that offer, assuming that one existed. To hold, as the court does, that there was a valid contract, indicates either a very careless and superficial application of the principles involved, or the promulgation of a doctrine strongly at variance with the principles long accepted as fundamental and established by authority in similar cases.

L. R. L.